Office - Supreme Court, U.S.
FILED
JAN 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 82-2120

IN THE

Supreme Court of the United States

October Term, 1983

Thomas F. Smith, Jr., et al.,
Petitioner,

v.

William P. Robinson, Jr., Rhode Island Associate Commissioner of Education, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school board associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States.

Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

ISSUE PRESENTED FOR REVIEW

Whether granting attorney's fees to "prevailing plaintiffs" in suits decided under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (hereinafter the EAHCA) on the basis of the fee provisions of 42 U.S.C. § 1983 and

§ 504 of the Rehabilitation Act, 29 U.S.C. § 794, when no claims have been adjudicated under those provisions, is contrary to the intent of those fee provisions and in conflict with the purposes and policies of the EAHCA.

ARGUMENT

I. INTRODUCTION

The district court below, in awarding attorney's fees, committed a major error, which, if reinstated by this Court, will have a severe, negative impact on schools around the nation and on their efforts to educate this nation's handicapped children. The district court below rationalized its holding that the attorney's fees incurred by petitioner were reimburseable under 42 U.S.C. section 1988 on the sole basis that a "substantial" constitutional claim had been asserted in addition to the claim under the EAHCA. The

court noted that the EAHCA itself provides for no such fee remedy, and held that "even if [the constitutional] claims ultimately would not have prevailed," the attorney's fees were still reimburseable. Smith v. Cumberland School Committee, No. C.A. 76-0510, slip op. at 9 (D.R.I. April 30, 1982) (emphasis added). That reasoning would open the door to a torrent of unnecessary claims and "artful pleadings," all with the sole end of obtaining attorney's fees where they have not previously been authorized.

Petitioner argues that such a result is justified by the legislative history of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. section 1988, and this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980). Amicus contends, however, that a closer reading of the legislative history will reveal that results such as

those of the district court were not intended, and that petitioner's reliance on Maher, supra, is a misplaced reading of that case, in light of ensuing decisions by this Court, the purposes of the basic statutes involved, and sound judicial policy.

II. TO ALLOW ATTORNEY'S FEES IN THE CASE AT BAR WOULD DISTORT THE INTENT AND CONCEPT OF THE "PRIVATE ATTORNEY GENERAL STATUTE," 42 U.S.C. SECTION 1988.

The Civil Rights Attorney's Fees Awards Act, supra, provides in relevant part that:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, [sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The statute was passed in reaction to this Court's decision in Alyeska Pipeline v. Wilderness Society, 421 U.S. 240 (1975), in which this Court refused to grant attorney's fees to private plaintiffs bringing suit to enforce a measure for the public good. Absent explicit authority from Congress, the Court held it could not modify the prevailing "American rule" which prohibited the granting of attorney's fees absent bad faith by the opposing party.

Petitioner, in relying on that portion of the measure's legislative history which seemingly allows the granting of attorney's fees even when no constitutional issue has been decided, overlooks the broader policies sought to be implemented by Congress in passing the Act. These broader implications, discussed below, indicate that the Attorney's Fees Act was never intended to serve as a means of gaining

fees in every single type of suit in which a constitutional claim could conceivably be brought, but was only intended to apply to a more limited class of actions.

In passing the Civil Rights Attorney's Fees Awards Act, supra, Congress was seeking merely "to remedy anomalous gaps in our civil rights laws," created by this Court's decision in Alyeska Pipeline, supra. S. Rep. No. 1011, 94th Cong., 2d Sess. 5909 (1976). After the Alyeska decision, fees might or might not be available to a prevailing party, depending under what measure they plead their case. For example, as the Senate report itself demonstrates, a claim of employment discrimination brought under title VII would entitle a prevailing plaintiff to attorney's fees; however, were the same claim to be brought under 42 U.S.C. section 1981, prior to the enactment of section

1988, no fees would be available. Similarly, a claim brought under title VIII alleging housing discrimination would bring with it a right to fees; the same claim brought under 42 U.S.C. section 1982 would not. Id. at 5911. Congress was, however, creating no startling new remedy. In each example, a provision for fees already existed in one form, and Congress was merely evening out the remedies so that whether the claim was under the Civil Rights Act of 1871 or a more specific statute such as title VII or VIII, attorney's fees would be available. No right ever existed, however, to attorney's fees under the EAHCA, because that act is not a civil rights act. To allow attorney's fees to be collected through section 1988 will result in a fee shifting not intended by the Congress.

Additionally, nothing in the history of section 1988 indicates that Congress intended section 1983 to be used as a conduit for suit under every conceivable type of statute which could allege a constitutional claim of one type or another. Rather, Congress wanted the statute to serve to encourage the enforcement by private individuals of civil rights laws--enforcement in the public interest. "Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality." H. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). "Congress has commonly authorized attorney's fees in laws under which 'private attorney generals' play a

significant role in enforcing our policies." S. Rep. No. 1011, supra, at 5910. Parties obtaining relief under such measures do so not for themselves alone, but also as a "private attorney general, vindicating a policy that Congress considered of the highest importance." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

The type of statutes to which Congress was referring, however, in upholding this private attorney general concept, are generally prohibitory in nature, passed pursuant to Congress' powers under section 5 of the fourteenth amendment. Statutes such as title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973, are all addressed to federal departments and agencies which are acting as granting

agencies. Each of these statutes includes the words: "No person shall be subjected ... to discrimination under federally assisted programs and activities." These words are directed toward the federal agencies, prohibiting them from awarding grants and contracts to anyone who is subjecting any "person" to discrimination in the federally assisted program or activity. Thus, where private rights of action exist, the plaintiffs are, in effect, acting as private attorneys general seeking to enforce the prohibition against discrimination in federally assisted programs.

The EAHCA, however, is not a statute of such a nature. It is a grant statute and the mandates in the statute under which Petitioner claims relief are grant conditions which each state must assure are met before funding will be provided. It

was passed solely pursuant to Congress' spending power, and is not worded in terms of prohibition, but rather, establishes mandates that each state must achieve in order to obtain funding. As such, there is not the same need for the private attorney general.

Advocates of broad accessibility to section 1988 argue that it is necessary in order to insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights. "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest." H. Rep. No. 1558, supra, at 6. Again, while such statements may be true in a general sense, when applied to the specific circumstances surrounding the EAHCA, their shortcomings become obvious.

Given the comprehensive nature of the substantive and procedural rights endowed by the EAHCA, discussed below, the public interest is not served by allowing suits for attorney's fees. Further, the entities most likely to get hit with fees here are not those with "substantial resources," as the Congress envisioned, id. at 7, but rather small local boards of education, struggling to meet conflicting demands for education services and balanced budgets, who have turned to federal funds to help in this battle. Just like damage remedies, which have been disallowed by several circuits under the EAHCA, e.g. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), attorney's fees could "portend a potentially massive financial liability upon recipients of federal funds in excess of the amount of the funds received." Ruth Ann M. v. Alvin Ind. School

District, 532 F. Supp. 460, 473 (S.D. Tex. 1982).

In many instances, these suits are being brought with the aid of public interest organizations, so that merely denying fees in this context does not mean that parents will be denied their day in court. See, e.g., Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982) (awarding $5,052 in fees to legal services attorney); Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980) (permitting fee award to American Civil Liberties Union attorney); Gary B. v. Cronin, 542 F. Supp. 120 (N.D. Il. 1982) (awarding $66,288.75 in fees to attorneys from Legal Advocacy Service, 18 St. Legal Services and Legal Assistance Foundation of Chicago); Campbell v. Talladega County Board of Education, 518 F. Supp. 47 (N.D. Al. 1981) (awarding $36,700.18 in fees to legal services

attorneys); Mattie T. v. Holladay, 522 F. Supp. 72 (N.D. Miss. 1981) (awarding $105,887.63 for fees and expenses to attorneys from Children's Defense Fund). Many of these organizations are funded through voluntary contributions. Whatever the altruistic goals of these organizations, should the courts be allowed to force the taxpayer indirectly to contribute to them?

III. THE COMPREHENSIVE NATURE OF THE EAHCA PRECLUDES THE NEED FOR EITHER SECTION 1983 OR SECTION 504 REMEDIES.

Unlike section 504 and the non-discrimination statutes which section 1983 and section 1988 seek to enforce, the EAHCA is a funding statute which sets forth specific requirements which states must meet. To allow the granting of attorney's fees through allegations of section 1983 and 504 claims would be completely at odds with the statute's purpose and structure.

The EAHCA is a funding statute under which states receive moneys to assist them in providing educational services to handicapped children. In return, those states accepting this "contract" must establish and maintain procedures whereby handicapped children and their parents can protect the children's right to a "free appropriate public education." 20 U.S.C. 1415(a-e). In passing the Act, Congress was seeking not only to codify already existing constitutional rights of handicapped children, but to establish a fair, thorough and efficient system of protecting those rights. 121 Cong. Rec. H. 7764.

Although measures like sections 1983 and 504 were already on the books, they were not enough to accomplish the Congress' objectives. A recurrent problem prior to the EAHCA was that "handicapped children

have always been slighted . . . [because] parents and advocates of these children have always had to look to a level of government higher than the local education agency to get help for the children." Id. The EAHCA changed that, however, by providing localized, easily accessible and understandable procedures whereby parents and the school systems could work together to solve any grievances they might have. At the same time, these procedures serve as a protective device, "speaking directly to the due process issues raised in Pennsylvania Association of Retarded Children v. Pennsylvania," 343 F. Supp. 279 (E.D. Pa. 1972), one of several cases which led to the enactment of the EAHCA. 121 Cong. Rec. H. 7764. Among these rights and procedures which schools must provide to handicapped children and their parents in order to qualify for funds are:

- an opportunity to present complaints with respect to any aspect of the child's education; 20 U.S.C. 1415(b)(1)(E)

- the opportunity for an impartial due process hearing by a local education agency; 20 U.S.C. 1415(b)(2)

- an impartial review by a state education agency; 20 U.S.C. 1415(c)

- the right to judicial review for any party aggrieved by the final decision of the state level agency; 20 U.S.C. 1415(e)(2)

- written notice to the parents before any changes in the child's placement or program; 20 U.S.C. 1415(b)(1)(B)

- an individualized education plan setting forth goals and services to be provided to the child, developed in consultation with the parents and educational experts; 20 U.S.C. 1401(19)

- annual review of the individualized program; 20 U.S.C. 1401(19)

- the opportunity to obtain an independent educational evaluation the results of which must be considered by the agency determining the child's educational needs; 20 U.S.C. 1415(b)(1)(A)

- the right to counsel as well as written or other permanent record of proceedings 20 U.S.C 1415(d).

The main point of these EAHCA procedures is not to interpose additional bureaucratic levels between the child and the education to which he or she is entitled, but rather to ensure that any decision reached has the full input of all parties concerned and serves the child's best interest. As Congressman Miller stated in debate on the EAHCA:

> Each [of the administrative safeguards and procedures] is designed to increase parental and professional input into the development of the program . . . and to safeguard the rights of children and parents. 121 Cong. Rec. H. 7764.

Unfortunately, however, the potential of an attorney's fees suit can easily upset the delicate balance of cooperation which the EAHCA strives to achieve. School officials may, based on their best judgment and the advice of experts, make a decision

concerning the placement of a child with which that child's parent disagrees. In the course of administrative procedures, however, the school district may become convinced that the parents are correct, and may concede to the parents' wishes. They may even concede to the parents just to stop the controversy, in the interest of the child, even when they believe the parents are incorrect. Yet such a change of heart can turn the parents into a "prevailing party" and, under the district court ruling, if they have also alleged section 1983 or section 504 claims, even though those claims are never addressed, entitle them to attorney's fees.

For example, in Espino v. Besteiro, 708 F.2d 1002 (5th Cir. 1983), the school district based its position as to the appropriate educational placement for the plaintiff-student on "good-faith compliance

with a reasonable interpretation of the law." Id. at 1005 (quoting from district court opinion). The parents, after exhausting their administrative remedies, turned to the court, as is their right under the EAHCA. After the district court granted a preliminary injunction in plaintiff's favor, the school district, rather than prolonging the litigation, worked out an arrangement satisfactory to all parties. While the district court, based on defendants' good faith, denied plaintiff's motion for attorney's fees, the appellate court reversed, using section 1988 as the basis for its decision. This was so despite the fact that the merits of plaintiffs' EAHCA claim were never fully litigated and that the constitutional claims were never even addressed by the lower court. Such rulings remove all incentive for the schools to work toward a

cooperative settlement or to make accommodations at any point. They rationalize that if they settle or concede, plaintiffs may become "prevailing" parties and they will have to pay fees, but if they continue to contest the issue, they may have a chance to win and avoid fees. Thus, the cooperative nature of the process developed by the Congress is turned on its head and changed into an adversarial proceeding.

Additionally, allowing suits under section 1983 or 504 when what are really being alleged are EAHCA claims provides the potential for plaintiffs to avoid the administrative remedies of the EAHCA. Section 1983 contains no exhaustion requirement. Patsy v. Board of Regents, 102 S. Ct. 2557 (1982). If all plaintiffs are doing in actuality is asserting a claim under the EAHCA, no matter how cleverly worded, they should not be allowed to

circumvent the EAHCA's procedures, procedures designed to encourage cooperation, not court suits. The same holds true for section 504 claims, where the generalized remedies of section 504 should not be utilized to circumvent the specifically enumerated administrative procedures of the EAHCA if this more specific act is applicable. To allow such a use of section 504 would be to seriously erode "the congressionally mandated requirement that state and local public education officials, and not the courts, initially review the merits of a plaintiff's claim." Rollinson v. Biggs, 567 F. Supp. 964 (D. Del. 1983).

In addition to its administrative procedures, the EAHCA is a complete remedy. Unlike the measure at issue in Maher v. Gagne, supra, where plaintiffs had to use section 1983 as a means of

access to the federal courts, the EAHCA contains provisions for judicial review in either state or federal courts. Thus, there is no need to ever turn to another measure to obtain relief. As this Court stated in Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 101 S. Ct. 2615 (1981):

> when the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under section 1983. 101 S. Ct. at 2626.

See also Brown v. G.S.A., 425 U.S. 820 (1976), holding that courts should look to the "balance, completeness, and structural integrity" of a statute in determining whether it creates an exclusive remedial scheme.

Further, this Congressional intent is not just to preclude enforcement of the

EAHCA under the "and laws" provision of section 1983, but also to prevent plaintiffs from utilizing the constitutional provision of 1983 as well. As the Ninth Circuit Court of Appeals recently stated:

> It is clear that where adequate alternative remedies remain available Congress may abrogate a statutory means for the enforcement of constitutional rights. The comprehensive nature of the remedies laid out in the EAHCA evinces a congressional intent to preclude reliance on either a statutory or a constitutional cause of action under section 1983. Katherine D. v. Hawaii Dept. of Education, ____ F.2d _____, slip op. No. 82-4096 (9th Cir. Nov. 7, 1983).

Petitioners assert that "Congress specifically stated that it did 'not intend' EAHCA enforcement 'to limit the rights of individuals to seek redress of grievances through other avenues such as bringing civil action[s] in Federal or

state courts to protect and enforce the rights of handicapped children under applicable law.'"(quoting S. Rep. No. 168, 94th Cong., 1st Sess. 26). They contend that, just as in the act at issue in Maher, supra, this is a "savings clause," preserving all other means of enforcing the rights at issue, and that Congress intended by this statement to leave the door open for redress of greivances through section 1983 for violations of the EAHCA.

When the statement is taken in its proper context, Congress' intent becomes clear. In context, the statement refers to the fact that the existence of the administrative procedures required by the EAHCA will not preclude the seeking of judicial relief. However, the means to obtain such relief are also provided in the EAHCA. 20 U.S.C. 1415(e)(2).

While this Court in Board of Education of Hendrick Hudson v. Rowley, 458 U.S. 176 (1982), has recognized that the EAHCA is primarily a procedural statute, it does impose substantive duties. As the appellate court below stated, "in enacting the EAHCA, Congress sought to ensure that handicapped children receive the very 'rights' that [petitioner] claimed were constitutional under section 1983." Smith v. Robinson, 703 F.2d 4, 8 (1st Cir. 1983). See S. Rep. No. 168, 94th Cong., 1st Sess. 6-7. This Court has intepreted this as the right to receive an "adequate" education, one that provides some "educational benefit" to the child. Thus, the EAHCA ensures more than the mere "non-discrimination" protected in section 504 and the Constitution. It establishes federal rights for handicapped children which have never been authorized or

provided to other students, e.g., the right of parents to participate in a meeting to develop an individualized educational program (IEP) for their child, the right of parents to present their own educational experts at such a meeting and the duty of the school district to listen to them, and the duty of the school district to receive permission from the parents before making any change in the placement of the child, to name but a few.

Special note should be made of the IEP requirements under the EAHCA. Amicus certainly agrees that the requirement, at least from a policy viewpoint, is a good one. It is a major underpinning of the EAHCA, and constitutes a primary basis for differentiating that statute from either section 504 or the Constitution, neither of which can require anything remotely similar. Certainly, every parent would

like to be assured that his child has a right to be personally evaluated by a group of experts every year to determine the child's individual needs and to set individual goals for that child. Every parent would like to have substantial input into the process through notice at every stage, the right to provide an independent evaluation which the district must review, and ultimately, the right to a hearing where there is a dispute. However, under federal law ONLY a specifically designated class of handicapped children -- not even all handicapped children -- have these rights, and they have them because the school district in which they live has chosen to accept funding under the EAHCA, not because of the Constitution or section 504. To make the district liable for attorney's fees in instances of dispute, merely because plaintiffs are able, through

careful wording of their complaint, to allege constitutional and 504 claims that in actuality merely restate the rights they are given under the EAHCA, is, at best, absurd. As one court has noted, "Plaintiffs, through artful pleading, should not be afforded the recovery of fees under a more generalized statute when the specifically applicable statute makes no provision for such a recovery." Rollinson v. Biggs, 567 F. Supp. at 970 (footnote omitted).

These arguments become especially compelling when the courts fail to even decide the constitutional or section 504 claims, but instead hold that, because the pleadings allege "substantial" claims, 448 U.S. at 132, and because the party prevailed in one form or another on its EAHCA claim, attorney's fees should be awarded. Such rulings encourage the filing

of section 1983 and 504 complaints in addition to the EAHCA complaint, with plaintiffs well aware that merely achieving a settlement on the EAHCA claim will suffice to get them attorney's fees under the other two measures.

The query should not be whether a court may, by choosing to ground its order on the EAHCA, deprive a plaintiff of attorney's fees to which he would have been entitled had the court based its decision on section 1983; but rather, whether plaintiffs should get fees to which they would otherwise not be entitled were it not for their clever pleadings. Too many courts, in awarding fees, assume that plaintiffs would have prevailed had their 504 or 1983 claims been litigated, but in actuality, those claims might not even have stated a cause of action were it not for the EAHCA. Yet the courts are left in a nightmare of trying to

determine which claims are "substantial" and which are not, in many instances without ever having gone to trial.

> From this twilight zone of uncertainty, the [c]ourt is thrust into a virtual fantasy world because the litigation settled before any disposition on the merits. The [c]ourt, therefore, finds itself in the absurd position of considering the constitutional claims in the surreal mileau of a motion for attorney's fees for claims that were neither fully developed by this [c]ourt nor considered by this [c]ourt in a decision on the merits. Rollinson v. Biggs, 567 F. Supp. at 971 (D. Del. 1983).

While courts should not "pass upon a constitutional question . . . if there is also some other ground upon which the case may be disposed of," Ashwander v. T.V.A., 297 U.S. 288 (1941)(Brandeis, J. concurring), in the context of attorney's fees it does become necessary to examine that Constitutional claim. Would it not be more efficient to either disallow such repetitive pleadings or to consider them

with the other claims, rather than to have to try to determine them after the fact in an attorney's fees proceeding.

Advocates of allowing fees under section 505 merely because a "substantial," but undecided, 504 claim has been alleged are on an even less steady footing. While it may be frowned upon judicially to decide a constitutional question when a statutory basis can be found, there is nothing to prevent the judiciary from addressing additional statutory claims merely because one has already been decided. Thus, courts should not be allowed to award attorney's fees on a "substantial" section 504 pleading unless violation of that measure has been specifically determined.

A closer look at section 504 provides even more support for such a policy, for violation of the EAHCA does not prima facie prove a violation of section 504. Section

504 is at once broader and narrower than EAHCA, Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982), cert. denied, 103 S. Ct. 1252 (1983), and where the two overlap, the EAHCA should control. "A precisely drawn, detailed statute pre-empts more general remedies." Brown v. GSA, 425 U.S. at 834.

Section 504, as noted above, is designed to assure that federal funds are not used to support programs and activities which discriminate against handicapped persons. There was no debate in the Congress on the provision and no committee reports exist to more fully develop the intent of Congress in passing the section. However, the Department of Education regulations under section 504 indicate that the provision is designed, at least in the context of education, to fill the gap where states such as New Mexico have refused

funding under the EAHCA. See 34 C.F.R. 104.36 (comment).

Section 504 is broader than the EAHCA in that, to fall within its bounds, a child must have "a physical or mental impairment which substantially limits one or more major life activities." 29 U.S.C. § 706 (7). The EAHCA definition, in contrast, is keyed to whether the child is in need of special education. If, for example, the only disability of a student is a missing leg, he or she would be "handicapped" under section 504 but would not be "handicapped" for purposes of the EAHCA. Additionally, section 504 is broader than the EAHCA in that it applies to all federal grantees, including transportation systems, hospitals, colleges and universities, etc., not just elementary and secondary schools.

Section 504 is also narrower than the EAHCA because it prohibits discrimination,

but does not make affirmative requirements. Southeastern Community College v. Davis, 442 U.S. 397 (1979) Questions involving the two measures merge in the primary and secondary education context only because states that receive EAHCA funding must create an array of services so as to provide some program from which each handicapped child can benefit. Identifying that program is much the same as determining appropriateness. "Section 504 would most clearly be a proper basis for a claim in this educational context in a case in which a child is completely excluded from all programs, because than the EAHCA inquiry, the appropriateness of the program, would not be a central issue." Timms v. Metropolitan School District, ____ F.2d _____, slip op. No. 82-3084 at n. 4 (7th Cir. Nov. 18, 1983). Under section 504, as long as a school

district does not preclude a child from receiving an education, it is irrelevant that the district never contacted the parents, never looked at the reports of the parent's independent evaluator, never gathered together the district's personnel to establish an IEP, etc.

It is also not clear whether the placement provisions of EAHCA under which petitioner's claim is made even apply under section 504. Certainly, under section 504, parents need not be consulted before a change in placement is made, although the EAHCA requires not just consultation but consent.

Even the Department of Education regulation under section 504 notes that developing an IEP is only "one means of complying with section 504." 34 C.F.R. 104.36 However, in order to be in compliance with the EAHCA, an IEP must be

formulated. There are also substantial differences in the due process requirements of section 504 and EAHCA. Since section 504 is a non-discrimination statute, handicapped students are entitled only to the same due process procedures provided to non-handicapped students, i.e., those required by Goss v. Lopez, 419 U.S. 565 (1975). The same is true under the United States Constitution and, thus, section 1983. On the other hand, EAHCA requires a full-scale hearing before an independent hearing examiner, provides for right to counsel and provides substantive rights such as a due process hearing before a change in placement is made if the parents and district disagree as to placement.

IV. CONCLUSION

What purpose, then, does adding claims under section 1983 and section 504 serve in light of the comprehensive substantive and procedural system of rights that Congress included in the EAHCA? None whatsoever--except to serve as a conduit for attorney's fees not intended by Congress to be available. As counsel for petitioner himself has stated, in a recent article:

> [A]s a matter of litigation strategy, plaintiffs should normally assert substantive claims under all three of these provisions [the EAHCA, section 1983 and section 504] so as to afford themselves the greatest opportunity to secure an award of attorney fees. I. Bodensteiner, "Availability of Attorney Fees in Suits to Enforce the Educational Rights of Children with Handicaps," 5 Western New England L. Rev. 391, 392 (1983).

Amicus submits that the use of "artful pleading" should not be allowed to distort the clear intent of Congress in passing the various measures at issue here.

Respectfully submitted,

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